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No. 87-1575

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court of Washington "take" Orion's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution by ruling that Orion's property is subject to a public trust doctrine which grants the general public a right to use the navigable waters over Orion's property for navigation, fishing and recreation?

2. Did the state take Orion's property by invasion in violation of the Fifth and Fourteenth Amendments?

3. Did the Supreme Court of the State of Washington deny Orion minimal constitutional protection under the Fifth and Fourteenth Amendments by refusing to recognize a cause of action for oppressive pre-acquisition conduct when the court found no evidence to support such a cause

of action capable of withstanding a motion for summary judgment?

4. Is it proper for the Supreme Court of Washington to characterize the Washington State Shoreline Management Act and regulations adopted thereunder as adopted in order to safeguard the "public interest in health, the environment, and the fiscal integrity of the area" and thus insulated from Orion's regulatory taking claim, when Orion's intentions for its property in conflict with the Act will harm the environment and commercial fishing and crabbing?

5. Did the state, under the totality of the circumstances here and under the present procedural posture of the case, permanently and completely take Orion's property in violation of the Fifth and Fourteenth Amendments?

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RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

Respondents, State of Washington, various state officials, and Skagit County, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Washington Supreme Court's decision in this case.

STATEMENT OF THE CASE

Padilla Bay. Padilla Bay is a large, shallow, brackish area of Puget Sound, located on the eastern side of the Sound about 70 miles north of Seattle, Washington. The area of the Bay is about 14,500 acres, of which 60 percent is exposed at mean lower low tide. The mean daily tidal range is about 8.4 feet.

Padilla Bay sustains a diverse and densely populated ecology, which includes many species important to man. The bird population is huge. Some 50,000 ducks normally winter in Padilla Bay, which also supports one of the densest wintering populations of peregrine falcons reported in North America. The land around the Bay also has significant populations of eagles, various types of owls, and great blue heron.

Much of the life of Padilla Bay depends, directly or indirectly, upon the eelgrass beds. Padilla Bay contains the second largest eelgrass bed on the West Coast. This eelgrass "meadow" not only serves as a nursery for commercially important fish and shellfish, but also acts as a "giant food factory" pumping nutrients into the rest of Puget Sound. The affidavit of Dr. Ronald C. Phillips gives an example which highlights the importance of eelgrass:

> In 1931-1933 a disease destroyed 90% to 100% of the eelgrass in the North Atlantic. Following the die-off many animals associated with eelgrass disappeared. The impacts on the human economy were severe. Scallops, fish, clams and crabs declined or disappeared . . . .

Eelgrass beds are very important to the growth of juvenile salmon, whose greatest growth occurs in such areas. Padilla Bay accounts for eight to ten

percent of all Puget Sound dungeness crab production. In 1984, 205,400 crab were taken from the area. In 1975, over 300,000 were taken. These were about evenly divided between sport and commercial catches.

Padilla Bay is located outside the urban areas of Puget Sound. Aside from the small town of Bayview, located on the eastern shore of the Bay, the land around the Bay consists mostly of farms and individual residences on the bluffs overlooking the water.

Navigation on Padilla Bay. The town of Bayview was platted in 1884. A sawmill and shingle mill were built. Products and logs were shipped by water through Padilla Bay. "Tugs and other boats of medium draft reach the town easily at high tide." An Illustrated History of Skagit and Snohomish Counties, pp. 238-39, Interstate Pub. Co.

(1906). Present day navigation is primarily recreational, and there are three boat launch ramps on the Bay. The trial court, in an unchallenged finding, held that for the purpose of public recreational navigation, Padilla Bay is navigable. Orion Corp. v. State, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) [Orion II], Pet. App. at A-45.

Orion's Efforts to Develop Padilla Bay. Beginning in 1906, Padilla Bay tidelands were sold by the state. The record does not show who purchased these tidelands, or why. At least 225 acres now held by the Orion Corporation [hereinafter Orion] were purchased subject to a reversionary clause providing that the tidelands would revert to the state if abandoned or used for purposes other than oyster cultivation.

In 1963, Orion began purchasing tideland acreage for the purpose of dredging and filling Padilla Bay to create a residential, Venetian-style community. By 1968, Orion had accumulated about 5,600 acres of Padilla Bay tidelands. (Orion holds no uplands.) Orion's tidelands were not contiguous, however, and some intervening property owners were opposed to the development. The State Board of Tax Appeals later concluded, with respect to Orion's proposed development:

> [F]urther progress of the contemplated development was halted in 1968 due to the state of the economy and opposition of the Samish Padilla Conservation Association formed to block the projected development by buying some strategically located tracts to prevent the dredging necessary for the beginning of the development.

Orion never did acquire these "strategically located" tracts; nor did it ever

acquire the necessary economic backing for its proposed Venetian-style community.

On December 4, 1969 the Washington Supreme Court announced its decision in Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970), holding that a fill of a lake bed which interfered with the public's right of navigation must be removed. Since the lake bed in question was only periodically submerged due to operation of a power dam at the end of the lake, the analogy to tidelands was obvious. The Governor of the State, the State Attorney General, petitioners for rehearing before the State Supreme Court, the Petition for Writ of Certiorari to this Court[1], title insurance

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[1]The petition for certiorari in Gallagher v. Wilbour, October Term, 1970,
(Footnote Continued)

companies and developers all concluded that the decision was potentially applicable to tidelands underlying navigable water.

On January 19, 1970, Governor Daniel J. Evans wrote the Chairman of the State Senate and House Natural Resources Committees announcing that he intended to "refuse to grant the concurrence of the State of Washington" to any pending U.S. Army Corps of Engineers permit applications for overwater construction or filling of tidal waters. This was popularly termed a

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(Footnote Continued)
No. 492, argued, as petitioner does here, that recognition of public rights in navigable waters was a "sudden change in state law" resulting in an unconstitutional taking without compensation. The state responded (as we do here) by pointing to repeated recognition of the public trust or public navigational rights in early Washington caselaw. See, e.g., New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901); Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 (1904); Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915).

"moratorium." Since at that time the state had no statute regulating fills of privately-owned tidelands, if a "moratorium" existed, it was due to regulations of the Corps of Engineers. This event had no direct impact on Orion, which has never applied for a permit from the Corps of Engineers.

Effective June 1, 1971, the Washington Legislature adopted the state's Shoreline Management Act, chapter 90.58 Wash. Rev. Code. That Act was intended to allow some development of shorelines of the state "in a manner which, while allowing for limited reduction of the rights of the public in the navigable waters, will promote and enhance the public interest." Wash. Rev. Code § 90.58.020.

After the adoption of the Shoreline Management Act, Orion discontinued its efforts to create a Venetian-style

community in Padilla Bay. Orion II, Pet. App. at A-11. Thereafter, Orion's efforts were directed primarily at securing a public buyer for the property. Orion considered and rejected two separate joint venture proposals in aquaculture on its property, both of which would have been permissible under the regulations in force at the time. Orion II, Pet. App. at A-11 and A-12.

In 1974, Orion rejected an offer to purchase the property by the State Department of Game, based upon a contemporaneous appraisal, for $90 an acre. Orion II, Pet. App. at A-12. In 1976, Orion rejected a purchase offer for $110 per acre from Nature Conservancy. In 1979, an appraisal by a private firm set an $80 per acre fair market value. In 1980, the State Department of Ecology offered to purchase the property for $100 an acre under a federal

estuarine sanctuary program. Orion refused that offer, and instituted this litigation. Orion II, Pet. App. at A-15 and A-16.

At no time, in the 25 years it has held these tidelands, has Orion applied for any local, state or federal license or permit to do anything with the property.

REASONS FOR DENYING THE WRIT

A. There Has Been No Final Judgment by the State Court.

This case is not final because the Washington Supreme Court has remanded this case back to the trial court to address "material factual issues . . . unresolved as to each component of the regulatory takings test . . . ." Orion II, Pet. App. at A-113. As a result of this remand, it is possible that the state courts may hold that an unconstitutional taking has occurred and that compensation may be awarded.

The remand is more than ministerial, and clearly covers more than purely state law questions. Rather, the remand will cover questions central to the federal constitutional issues in this case. Examples are: What uses of the property were permissible before and after governmental regulation? What decline in property value, if any, occurred as a result of the regulation? If a taking has occurred, what just compensation should be accorded? The answers to these questions are central to any review of the federal questions which may arise from this case. In short, in the words of this Court in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633 (1981):

> [F]urther proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore is not final, and we are without jurisdiction to review it.

There has, likewise, been no decision upholding the validity of a state statute such as would give rise to jurisdiction under 28 U.S.C. § 1257(2). Although the state court indicated that appropriate police power enactments, including the Shoreline Management Act (ch. 90.58 Wash. Rev. Code), normally are "insulated" from consideration as takings, it still left open the possibility that the Shoreline Management Act under the factual circumstances of this case may have resulted in an unconstitutional taking. The facial validity of that Act was simply not drawn into question, and there was thus no decision upholding its validity.

B. Issues of Material Fact Preclude Summary Judgment.

This case came to the state court upon an appeal from the trial court's rulings

upon cross motions for summary judgment. The state court held that several genuine issues of material fact exist, making summary judgment improper. Orion II, Pet. App. at A-6 and A-113. Summary judgment may be given only if there is no issue of material fact. Fountain v. Filson, 336 U.S. 681 (1949). It seems inappropriate for this Court to grant certiorari in a case where its first, and perhaps most important, analysis will be to review a complex record for the presence or absence of gaps or inconsistencies.

C. This Case Is Not Ripe for Review.

The state court's remand to address the questions of compensation leads to ripeness problems. In Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985), this Court noted that the "Fifth Amendment does not prescribe the taking of property; it prescribes taking without just

compensation." The compensation does not have to occur before the taking; rather, the Constitution is satisfied if the state provides a reasonable and adequate means for obtaining compensation after the taking. The state's action is thus not "complete" until the state fails to provide adequate compensation for the taking, 473 U.S. at 195. In Orion II, the state court remanded in part for a determination of the adequacy of compensation. State action is thus not complete and not ripe for review.

D. Orion Has Failed to Show a Decline in Its Property Value.

In Florida Rock Indus. v. United States, 791 F.2d 893 (Fed. Cir. 1986), the court noted, in reviewing the opinions of this Court:

> We doubt very much whether the Court ever meant to say, or would have said, that a denial of any immediately viable use must be a taking even though it had no

effect on the fair market value of the property.

In Goldblatt v. Hempstead, 369 U.S. 590 (1962), this Court held that appellants failed to state a takings claim when the record failed to show the loss, if any, which appellants would suffer as a result of the ordinance in question. The record in Orion II suffers from a similar defect. There is little or no evidence that suggests any decline in value of Orion's property as a result of any judicial, legislative or administrative activity.[2]

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[2]For instance, the State Board of Tax Appeals, after reviewing Orion's property transactions from 1964 through 1967, concluded that the Padilla Bay tracts held by Orion had a value of $50 per acre. In 1974, after the Washington Supreme Court's decision reiterating public navigational rights in Wilbour v. Gallagher, supra, and the enactment of the State Shoreline Management Act, a private appraiser valued this acreage at $90 per acre.

This is one gap in the record that may be filled if the state court's remand takes place, although the state believes it should have led to the dismissal of Orion's claim as was done in Goldblatt v. Hempstead, supra.

E. The State Court's Holding That Orion May Not Use Its Property Underlying Navigable Water so as to Substantially Impair Public Rights of Navigation and Fishing is Not a Departure From Precedent.

In Orion II, the state court held that "Orion had no right to make any use of its property that would impair the public rights of navigation and fishing, as well as the incidental rights and purposes recognized previously by this Court." Pet. App. at A-45. The "incidental rights" are those of "fishing, boating, swimming, water skiing, and other related recreational

purposes . . ." Pet. App. at A-44. Basically, the state court held that a tideland property owner could not fill a whole bay which had been used for navigation since the time of statehood. The public right recognized by the state court in Orion II and in earlier cases is a right of "navigation," and does not pertain to Orion's ability to exclude the public from its lands when they are not covered by water.

The state court's recognition of a public trust, or public navigational rights, far from being a sudden change in the common law, is supported by precedent running back to the turn of the century. Orion points to no cases, because there are none, in which the State of Washington has attempted to relinquish its ability and obligation to protect the public rights of navigation and fishery in waters seaward of

the inner harbor lines established in urban areas.

Twelve years after statehood, the Washington Supreme Court, in New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901), wrote:

> The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was, by the common law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the right surrendered by the constitution to the United States. The new states admitted

> into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. [Citations omitted.]

In the same opinion the court went on to describe the rights of the state in a navigable lake as "the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation." Id at 503, 64 Pac. at 738.

Three years later in Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 (1904), the Washington Supreme Court held:

> Being navigable water, when the state sold the bed thereof to the appellants, as stated in the finding No. 8, appellants took the title subject to the paramount right of the public to use the same for navigation. Watkins

> v. Dorris, supra, [24 Wash. 636, 64 Pac. 840] p. 644 [64 Pac. at 843]; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190. The fact, therefore, that the title of the bed of the channel, or the land upon which an obstruction is placed, is vested in the appellants, does not confer upon them the right to obstruct navigation upon navigable water. It is no doubt true that the sovereign authority may control and regulate the use of navigable waters, but it does not follow that an individual, over whose lands such waters flow, may do the same. People v. St. Louis, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339. By the mere act of selling land to the appellants, the state conferred no right upon them to interfere with the rights of the public in the use of the highway. 34 Wash. at 274-75, 75 Pac. at 809.

See also the discussion of public rights in lands underlying navigable waters contained in Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915), quoting, with approval, from People v. California Fish Co., 166 Cal. 576, 584, 138 Pac. 79, 82 (1913) and Ward

v. Mulford, 32 Cal. 365, 372 (1867), as follows:

> Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned, ... 86 Wash. at 231, 149 Pac. at 952.

As previously discussed, the Washington Supreme Court continued to recognize public navigational rights in the 1969 case of Wilbour v. Gallagher, supra. Finally, in Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989 (1987), the court concluded with respect to the public trust doctrine:

> Although not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has

> always existed in the State of Washington. [107 Wn.2d at 670.]

The Washington State Constitution provides for a system of harbor lines within the navigable harbors of the state. Wash. Const., Art. 17, § 1. It has generally been held that tidelands inside the inner harbor line are treated as land. For instance, in Globe Mill Co. v. Bellingham Bay Improvement Co., 10 Wash. 458, 463, 38 Pac. 1112 (1895), the court stated:

> [T]he legislature, in proposing to dispose of the inner tide lands, under the provisions of the constitution in regard to harbor areas, acted on the supposition that all these tide lands are in the course of time to be converted into solid lands.

See Johnson & Cooney, Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters, 54 Wash. L. Rev. 275 (1979). Harris v. Hylebos Indus., Inc., 81 Wn.2d 770, 505 P.2d 457 (1973), relied on by

Orion, dealt with tidelands inside the inner harbor line.

The fact that the state allows filling in harbor areas as an aid to navigation is not inconsistent with the recognition of a public trust, or public right of navigation in the rest of its navigable waters. The same thing was encouraged by this Court in Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892).

It is perhaps impossible to survey any extensive body of caselaw spanning nearly one hundred years and find that all of the cases are perfectly consistent with each other. But that is not what Justice Stewart was concerned about in Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring); Justice Stewart reasoned that "a sudden change in state law, unpredictable in terms of the relevant precedents" could work a taking. Here the

state court's decisions are clearly grounded in precedent.

CONCLUSION

Orion is asking the Court to accept an interlocutory appeal in a case where the state courts have not reached a final decision on any of the federal questions involved. The state courts have yet to determine whether or not a taking of property without just compensation has occurred, or whether compensation should be provided. The state court has reached decisions on some components of those questions, but it seems pointless to review those decisions until the final outcome is reached in the state courts. After all, this case changed significantly from Orion I (Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 [1985]) to Orion II. It could change again.

The Court should also reject Orion's suggestion that the Court review the history of Washington law pertaining to tidelands. States have always enjoyed wide latitude in shaping their own laws with respect to navigable waters. See Shively v. Bowlby, 152 U.S. 1 (1894). The state court's decision in Orion II is clearly within the ambit of state and national precedent.

Finally, it should be recalled that this case arose on cross motions for summary judgment and that the state court concluded that "several genuine issues of material fact exist, making summary judgement improper." Orion II, App. at A-6. It would be unusual for this Court to review a "takings" case when important facts, such as the property values at any relevant time, have not been resolved in the state judiciary.

The State of Washington submits that the Petition for Writ of Certiorari under this Docket should be denied.

Dated: May 5, 1988.

Respectfully submitted,

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